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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DEWAYNE MICHAEL DARDEN,

Defendant and Appellant.

E048466

(Super.Ct.No. FSB056793)

OPINION

APPEAL from the Superior Court of San Bernardino County. Brian S. McCarville, Judge. Affirmed.

Scott Weis, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant DeWayne Michael Darden was sentenced to state prison for two years, following a contested hearing on a petition to revoke his probation.

BACKGROUND

On June 29, 2006, as a woman alighted from a bus at an intersection in San

Bernardino, defendant kicked her from behind, knocking her to the ground. She turned to ask him what he was doing, only to be struck in the face by the defendant, either by punching with his fist, or a kicking with his foot. Then defendant ran off. Officer Yanez was flagged down at the intersection and pursued defendant on foot. Officer Gonzalez was dispatched to the location to assist Officer Yanez. When the two officers caught up with defendant, he resisted arrest by punching and kicking the officers. Officer Gonzalez tackled defendant, and defendant landed on his back on the ground with the officer atop him. While on the ground, defendant punched Officer Gonzalez more than once and took a swing at Officer Yanez's head.

Defendant was charged with one count alleging assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1), count 1), and two counts of resisting an executive officer. (Pen. Code, § 69, counts 2 and 3.) He pled guilty to counts 1 and 2 pursuant to plea agreement whereby he was placed on probation conditioned on serving 129 days in county jail, cooperating with his psychiatrist and taking all prescribed medications.

His probation conditions also included a directive to report to his probation officer upon his release from jail, but he failed to report. Nevertheless, the probation officer believed defendant's troubles were the result of his not taking his medication and recommended reinstatement. Probation was reinstated as modified to require defendant to cooperate with any psychiatric or psychological treatment program and take any prescribed medications. Although defendant did report to his probation officer, he failed to appear at his next probation review hearing, resulting in a second proceeding for

revocation of probation. Probation was reinstated again on the same terms and conditions.

On January 30, 2008, a new petition for revocation of probation was filed relating to three misdemeanor arrests for trespassing on railroad property. (Pen. Code, § 369i.) The petition also alleged defendant failed to appear at his arraignments on those cases. On February 29, 2008, defendant admitted the alleged violation and was reinstated on probation. The terms and conditions of probation were modified to order additional custody, for a total of 160 days in jail. The remainder of the terms, including a condition requiring defendant to report to his probation officer immediately upon his release from jail, was reinstated.

Defendant's fourth violation of probation occurred in April 2008, when he failed to appear at another probation review hearing. Defendant was assessed for the STAR program (Supervised Treatment After Release¹) and was eventually accepted into the FACT program (Forensic Alternative Community Treatment). On July 16, 2008, he was reinstated on probation and the terms of his probation were modified to include the condition he attend and complete the FACT program.

However, the following month, defendant failed to appear at his probation review hearing resulting in the fifth revocation of his probation. After mental health assessments were completed, the court found defendant was ineligible for mental health court.

¹ See United States Department of Justice, Office of Justice Programs, *Emerging Judicial Strategies for the Mentally Ill in the Criminal Caseload: Mental Health Courts in Fort Lauderdale, Seattle, San Bernardino, and Anchorage* (2000), Chap. 5 <http://www.ncjrs.gov/html/bja/mentalhealth/chap5.html> [as of December 29, 2009].

Defendant admitted he had violated the condition relating to compliance with the FACT program, and was reinstated on probation. His probationary terms and conditions were modified to increase his custodial time to 365 days in county jail. All other terms and conditions remained in effect.

On December 4, 2008, the probation officer petitioned to revoke defendant's probation (his sixth violation) for failing to report to his probation officer upon his release from custody. Following a contested hearing, the court found defendant had violated probation. His probation was revoked and he was sentenced to state prison for the low term of two years on count 1, with a concurrent term of one year four months for count 2. Defendant received credit for 371 days actually served in local custody, plus 186 days conduct credit (Pen. Code, § 4019) for a total credit of 557 days served. Defendant appealed from the contested violation of probation.

DISCUSSION

At his request, this court appointed counsel to represent defendant on appeal. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738 [87 S.Ct. 1396, 18 L.Ed.2d 493], setting forth a statement of the case, a summary of the facts, and potential arguable issues, and requesting that we undertake an independent review of the entire record. We offered defendant an opportunity to file a personal supplemental brief, but he has not done so.

Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the record for potential error. There is substantial evidence to support the trial court's finding that defendant was in violation of probation, given the

undisputed evidence that defendant's failure to report to his probation officer, and the chronic nature of the violation. A court may revoke and terminate probation if, in its judgment, the court has reason to believe that the probationer has violated any of the conditions of probation or has subsequently committed other offenses. (Pen. Code, § 1203.2, subd. (a).) The burden of proving a violation of probation at a revocation hearing is by a preponderance of evidence. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 445.)

There was no abuse of discretion at sentencing, either. The choice of the appropriate term is within the broad discretion of the court (Pen. Code, § 1170, subd. (b)); the imposition of the low term of punishment cannot be said to be an abuse of discretion. Reinstatement on probation was not a viable option, considering defendant had already served the maximum amount of local time in county jail. Finally, we have reviewed the calculation of the defendant's custodial credits and have found no error.

We have completed our independent review of the record and find no arguable issues.

DISPOSITION

The judgment is affirmed.

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s/Ramirez
P.J.

We concur:

s/McKinster
J.

s/Richli
J.